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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 463X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**REPLY OF KING COUNTY, WASHINGTON TO GNP RLY'S REPLY TO
COMMENTS OF KING COUNTY REGARDING
PETITIONS OF GNP RLY INC.**

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Dated: January 7, 2011

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**REPLY OF KING COUNTY, WASHINGTON TO GNP RLY'S REPLY TO
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Although most of the arguments made by GNP Rly Inc. ("GNP") in its Reply Comments of GNP Rly Inc.'s , submitted on December 15, 2010, do not withstand facial scrutiny and do not warrant any response, King County, Washington (the "County") believes that a short reply to GNP's Reply would assist the Board because GNP's Reply rests on a fundamental mischaracterization of (1) the County's position on reactivation of freight rail service and (2) GNP's own position on the central issue of whether the Petitions can be granted even when GNP lacks any property interest in the right-of-way.

First, GNP characterizes the County as opposed to the reactivation of freight rail service in general and to GNP in particular. *See* GNP Reply at 41-43. GNP apparently hopes to portray the County as unalterably opposed to the resumption of rail service in order to make the Board feel as though it must exercise its authority in an extraordinary way in order to break this imagined wall of opposition. Accordingly, GNP attempts to unfairly portray the County as incapable of exercising its trail sponsor obligations or reactivation rights. *Id.* This position is nothing more than a straw man created by GNP in an effort to justify its request that the Board depart from its long-standing precedent and vacate a NITU, and grant GNP operating authority, even though GNP is unable to make any showing that it can ever obtain the property or contract rights from the Port and Redmond GNP needs in order to make any use of the right-of-way. Unable to provide such proof, and unable to present a cogent reason for the Board to cast that precedent aside, GNP appears to rest its case on the simplistic notion that if the Board fails to grant the Petitions, GNP will not be able to reactivate rail service. This position is flawed in several critical respects.

Fundamentally, the County is *not* unalterably opposed to the reactivation of rail service on the Lines. As the County repeatedly stated in its Comments, the County fully understands that the interim trail use may have to give way to the resumption of rail service and the County is prepared to fulfill its obligations as trail sponsor in the event a reasonable proposal is advanced to resume rail service. County Comments at 4-5. The County is no stranger to railbanking, as it has been a trail sponsor for a number of years on other lines. With respect to this Line, the Board has explicitly instructed the County as to its rights and obligations as trail sponsor and owner of the reactivation rights, and the County is under no illusions about the meaning of its obligations

as trial sponsor. *BNSF Ry. Co. – Acquisition Exemption*, STB Finance Docket No. 35148 (Service Date Sept. 19, 2009).

To be clear, however, reactivation is not automatically available to any entity that proposes it. As the Board ruled, “a *bona fide* petitioner, under *appropriate circumstances*, may request a NITU to be vacate to permit reactivation. . . .” *Id.* at 4 (emphasis added). However, as the County demonstrated in its Comments, GNP’s proposal as currently framed is not the kind of bona fide proposal that should trigger the County’s obligations to step aside, nor are these the appropriate circumstances. Fundamentally, GNP lacks the one critical element without which it simply cannot proceed: GNP lacks any property or contract right to use the right-of-way for its proposed freight rail service. Despite GNP’s efforts to garner public support, the owners of the right-of-way, the City of Redmond and the Port of Seattle, have refused to convey any such rights. *See* Comments of Port of Seattle at 2 (filed Dec. 6, 2010); Comments of the City of Redmond at 39-42 (filed Nov. 9, 2010). Without such rights, GNP has no legal right or ability to make any use of the Lines whatsoever. Moreover, the County has raised, and there remain unanswered, substantial questions regarding the viability of GNP’s business plan, its financial ability to carry out its proposed plan and questions about whether it is using the Board process as a sham to shield its intrastate passenger rail operations from state and local regulation.

Second, and central to the question that this Board has asked the parties to address in these proceedings, without property or contract rights to use the right-of-way, or a credible demonstration that it will obtain such interests, GNP will not be in a position to provide rail service, *even if the Board grants its petitions*. As GNP recognizes, Board operating and acquisition authority are permissive and do not provide all of the rights and powers needed to

operate rail service. Thus, granting GNP's Petitions will not enable or advance the reactivation of rail service.

All that would be accomplished is to vacate the NITU and undermine the current regional effort to develop the corridor for multiple public uses, including potential rail service, without giving GNP anything more than the right it already possesses to continue negotiating with the Port and Redmond. Because the Port and Redmond have explicitly indicated that they do not intend to grant GNP any further rights in the right-of-way, no purpose would be served by granting GNP's petitions at this time. Neither, it is important to realize, would GNP be harmed by such a denial, because the absence of any Board authority is not a bar to GNP's further negotiations. The key point is that once GNP (or any other carrier) has assembled all the elements to provide rail service, including a bona fide business plan, financial backing *and* property or contract rights to use the right-of-way, it would then be in a position to seek vacation of the NITU and other necessary Board approval.

Third, GNP attempts to minimize the impact of its inability to secure any rights in the right-of-way by trying to insist that "there is no reason for GNP to acquire [the Port and Redmond's rights in the Lines] . . .," GNP Reply at 29, and further insists that it is not trying to "expropriate" an interest in the Lines, *id.* at 23. GNP offers *no* authority or other support for this proposition, or any reason *why* it need not acquire such rights. Its position is more wishful thinking than reasoned analysis. Indeed, GNP itself does not seem to believe its own position because GNP also states that "it would be pleased to enter into reasonable compensation arrangements with the Port, Redmond, and other affected parties." *Id.* at 23. Of course, GNP cannot enter into such compensation arrangements without the *agreement* of the Port, Redmond and others, and not even GNP argues that the Board has the authority to force Redmond and the

Port to enter into a contract with GNP for the use of the right-of-way.¹ Indeed, the County itself had to acquire easement rights from the Port to allow it to use the right-of-way for interim trail purposes, and would have to similarly acquire rights if it were to resume rail service itself. *See* County Comments, Exhibit 12 at Section 2(b) (Purchase and Sale Agreement) (filed Nov. 9, 2010). GNP is no different, and cannot avoid having to acquire the necessary rights to use the right-of-way from the Port and Redmond just by obtaining permissive authority to acquire the County's reactivation rights.

At bottom, GNP cannot get around the fact that it will have to reach some agreement with the owners of the right-of-way in order to make any use of the right-of-way. Furthermore, GNP offers no legal argument that could possibly support the position that it can proceed with any operations without such an agreement. To the contrary, the Board's recent decisions in *San Francisco Bay RR – Mare Island – Operation Exemption – California Northern RR*, Docket Nos. FD 35303 and 35304 (Service Date Dec. 6, 2010) and *San Francisco Bay RR – Mare Island Petition for Emergency Service Order and Petition for Declaratory Order – Lennar Mare Island, LLC*, Docket No. FD 35360 (Service Date Dec. 6, 2010), underscore that being able to secure a right to use a right-of-way is a necessary *predicate* to obtaining any Board authority to operate over a right-of-way, and that the Board's procedures for authorizing the acquisition of a right-of-way do not provide a mechanism for forcing access to a line of railroad.

Unable to provide any legal authority to support its position, GNP attempts to minimize the significance of its Petitions by arguing that because it is seeking only permissive authority,

¹ GNP suggests that the County is somehow to blame for GNP's failure to obtain such agreements. GNP Reply at 23. That is not true, and GNP provides no evidence to support its suggestion. As the Verified Statement of Pam Bissonnette makes clear, the County was unaware of any discussions between GNP and the Port or Redmond prior to August 2010. Bissonnette V.S. at ¶¶ 25-27. While it is the case that none of the local stakeholders have supported GNP's proposals, each apparently arrived at its own decision based on its evaluation of GNP's proposal. GNP has no one to blame but itself for its failure to secure the agreements it needs to execute its plan.

there is no harm in granting the petitions and that concerns about loss of the NITU can be addressed by granting conditional approval. GNP Reply at 22. GNP further asserts that concerns about the possible reversion of the right-of-way if the NITU is abandoned are overstated. GNP Reply at 22-23. But GNP provides no proof that the affected right-of-way is not subject to reversionary interests or that putative property owners would not seek to assert reversionary rights and embroil the right-of-way in needless litigation. In fact, like most railroad corridors, possessory interests consist of a mix of fee ownership and easements in the corridor. Without careful analysis of the deeds and of Washington state law interpreting similar provisions in other deeds, GNP's unsupported assertion provides no comfort for the County, the Port or the City of Redmond that their carefully constructed plan for preservation of this corridor, and further public uses of the corridor, will not be undercut by removal of the NITU without a viable rail operation ready to step onto the property.

More fundamentally, GNP's position begs the question of why the Board would grant any form of approval knowing that GNP cannot consummate its desired transaction because the Port and Redmond are not willing to grant GNP the rights it seeks to use the right-of-way. Again, having Board authority would not improve GNP's ability to acquire rights from the Port and Redmond but it would harm the County and others. Conversely, GNP would not be harmed by not having Board authority because it is still free to negotiate with the Port and Redmond, and would be free to re-present its petitions if it were able to secure an agreement for the use of the right-of-way.

Finally, GNP again attempts to present itself as an active railroad in an effort to somehow bolster its position. GNP Reply at 4. This is misleading because GNP fails to make clear that it does not perform any actual railroad operations. GNP has contracted with Ballard Terminal

Railroad Company LLC to perform freight rail operations on the Freight Segment of the Woodinville Subdivision. In addition, there is no active rail service on the 0.2 mile stranded segment in Snohomish, Washington over which GNP has obtained operating authority. *GNP Railway, Inc. – Application for Modified Certificate of Public Convenience and Necessity*, Finance Docket No. 35151 (Service Date Aug. 13, 2008). *See also* King County Comment at 3 (filed Nov. 9, 2010). Just because GNP has secured rights to operate elsewhere does not mean that it has exercised those rights in a way that permits this Board to conclude that it is, in fact, operating as a rail carrier at this time.

WHEREFORE, and in view of all of the foregoing and of the facts and argument submitted by the County in its Comments and Reply Comments submitted in this proceeding, the County respectfully requests this Board to deny the relief requested by GNP.

Respectfully submitted,



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Dated: January 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that I am providing a copy of the foregoing REPLY OF KING COUNTY, WASHINGTON TO GNP RLY'S REPLY TO COMMENTS OF KING COUNTY REGARDING PETITIONS OF GNP RLY INC. upon the following parties of record by first class mail with postage prepaid and properly addressed:

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A handwritten signature in black ink, appearing to read 'W. Eric Pilsk', is written over a horizontal line.

W. Eric Pilsk

Dated this 7th day of January, 2011